IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 4104 of 2004

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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KOLINIBEN DUNILBHSI KSPASI - Petitioner(s)

Versus

SUNILBHAI VADIBHAI KAPASI - Respondent(s)

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Appearance :
MR. J.R.NANAVATY with MR AR THACKER for Petitioner No(s).: 1.

MR. P.J.BHATT for MR HARSHAD J SHAH for Respondent No(s).: 1.

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CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA

Date : 25/08/2005

ORAL JUDGMENT

1.By filing instant petition under Articles 226/227 of the Constitution of India, the petitioner seeks to challenge the order dated 2.1.2004 recorded below

application exh.73 in Family Suit No. 333 of 2000 by the learned Judge, Court No.4, Family Court, Ahmedabad, by which the application filed by the respondent-husband to reconsider its order dated 11.10.2001; to modify the same and reject the application submitted by the petitioner-wife for getting visitation right of his minor daughter Aashaka, who is at present in the custody of respondent-father, came to be granted and thereby order dated 11.10.2001 recorded below application exh.17 directing the respondent-father to take minor child Aashaka to the residence of the petitioner-mother on every Sunday between 10.00 a.m. to 6.00 p.m. and to allow to visit the child without any hindrance or obstruction has been revoked.

2. The petitioner has married the respondent on 26.2.1993 and was residing with him thereafter. Out of the wedlock, a female child named Aashaka is born on 9.5.1994. The relation between the petitioner and her husband-respondent became strained and therefore both are residing separately. The petitioner therefore filed an application under Section 9 of the Hindu Marriage Act ('the Act' for short) before the learned Civil Judge (SD), Ahmedabad Rural against the respondent for getting decree of restitution of conjugal rights. In the said proceedings, the petitioner also moved an application under Section 24 of the Act claiming Maintenance, Pendente Lite and Expenses of Proceedings. The said application was registered at exh.4 in HMP No. 45 of 1998. The petitioner also filed application u/s 26 of the Act for custody of the minor child Aashaka. The said application was registered at exh.17 in HMP No. 45 of 1998. In the said proceedings, the learned Civil Judge

passed an order and directed the respondent-father to bring the minor child Aashaka in the court.

3. Thereafter Family Court was constituted and the case was transferred to the Family Court and it was newly numbered as Family Suit No. 333 of 2000.

4. The learned Family Judge heard the application exh.17 filed by the petitioner for taking custody of the minor child Aashaka. The learned Judge of the Family Court vide order dated 11.10.2001 partly allowed the application filed by the petitioner and directed the respondent to permit the petitioner to see her daughter Aashaka from 10.00 a.m. to 6.00 p.m. on every Sunday and also directed the respondent to see that the child Aashaka is sent to the place of the petitioner on every Sunday at 10.00 a.m.

5. Aggrieved thereby, the respondent filed Special Civil Application being Special Civil Application No. 11090 of 2001 before this Court, challenging the order passed by the Family Court. The said SCA 11090/2001 was finally heard by this Court (Coram: D.K.Trivedi,J). This Court vide order dated 21.3.2002 disposed of the said SCA.

6. Aggrieved thereby the respondent filed Letters Patent Appeal being LPA No. 164 of 2002. The said LPA 164/2002 came up for admission hearing before a Bench comprising the Hon'ble the Chief Justice and Mr. Justice B.C.Patel on 1.5.2002. The said LPA 164/2002 was withdrawn by the respondent.

7. Thereafter the respondent filed application exh.73 in HMP No. 333/2000 before the Family Court for modification of the order passed below application exh.17 dated 11.10.2001. The said application was

heard by the learned Judge, Court No.4, Family Court, Ahmedabad. The learned Judge has granted the application filed by the respondent at exh.73 vide order dated 2.1.2004 and thereby order dated 11.10.2001 has been revoked, which has given rise to the present petition.

8. Mr. J.R.Nanavaty, learned advocate with Mr. A.R.Thacker, learned advocate of the petitioner, contended that once the order dated 11.10.2001 passed by the Principal Judge, Family Court No.1 below application exh.17, which has become final in view of the order passed by this Court (Coram: D.K.Trivedi,J)in SCA 11090/2001 dated 21.3.2002, the said order cannot be reviewed or modified by the In charge Principal Judge because the order passed by the Principal Judge dated 11.10.2001 has been already merged in the order passed in SCA 11090/2001 dated21.3.2002. It is also contended that the order in SCA 11090/2001 was the subject matter of challenge in LPA 164/2002 which has been dismissed as withdrawn. Therefore also the learned Judge of the Family Court has no power to review the order dated 11.10.2001. It is also contended that the Family Court has no power of review and the power of review is not inherent power and it must be conferred by law or by necessary implication. In the Family Court Act, there is no power of review as the original order passed by the Principal Judge below application exh.17 dated 11.10.2001 has merged into the order passed in SCA 11090/2001 dated 21.3.2002 as well as LPA 164/2002. It is also asserted by him that the Division Bench of this Court while deciding the LPA 164/2002 has not granted any liberty to the respondent. Inspite of that the In charge Principal Judge of the

Family Court entertained the application exh.73 and modified the order which has been confirmed by this Court in SCA 11090/2001 and LPA 164/2002. Besides this, it is also considered that there is no new ground made out by the petitioner to review the order passed by the Family Court. Therefore, according to him, the order which is impugned under this petition is without jurisdiction and passed without considering the provisions of law and hence the said order deserves to be quashed and set aside by allowing this petition. He, therefore urged to allow this petition.

9. In support of the aforesaid contention he also pressed into service reported decision of the Supreme Court in the case of Patel Narshi Thakershi and others v/s Pradyumansinghji Arjunsinghji, AIR 1970 SC 1273 to canvass the proposition that power to review is not an inherent power, and it must be conferred by law either specifically or by necessary implication.

10. Per contra Mr. P.J.Bhatt, learned advocate of the respondent, contended that there is a provision u/s 26 of the Hindu Marriage Act to revoke, review, suspend or modify the order for the welfare of a child that includes the custody, maintenance and education of minor children, consistently with their wishes. The Court may, from time to time, pass such interim orders and make such provisions in the decree as it may deem just and proper with respect to the custody, maintenance and education of minor children, consistently with their wishes, wherever possible, and may, after the decree, upon application by petition for the purpose, make from time to time, all such orders and provisions with respect to the custody, maintenance and education of such children as might have been made

by such decree or interim orders in case the proceeding for obtaining such decree were still pending, and the Court may also from time to time revoke, suspend or vary any such orders and provisions previously made. Therefore, according to him power to review the earlier order passed by the Family Court is inbuilt in the statute itself and therefore, the learned trial Judge has committed no illegality or infirmity, much less jurisdictional error in passing the impugned order which does not call for any interference in this petition, filed under Article 227 of the Constitution. According to him, besides this, there is ample evidence on record that the minor child Aashaka is not prepared to reside with the petitioner-mother. That fact can be reflected from the various orders passed by the Family Court as well as by this Court and therefore the learned Judge of the Family Court, after considering the wishes and willingness of the minor child Aashaka has reviewed its earlier order as according to the learned Judge it was not possible to implement the order dated 11.10.2001 recorded below application exh.17 which gives visitation right to the petitioner. Therefore, according to him, the impugned order does not call for any interference by this Court in exercise of powers conferred under Article 227 of the Constitution of India. Petition, therefore lacks merit and deserves to be rejected. He, therefore urged to reject the petition.

11. In support of the aforesaid contention, he relied upon the following 2 decisions of the Supreme Court:

(i) Bijay K. Prasad v/s Ranjana, (1999) 9 SCC 544.

(ii) Sumedha Nagpal v/s State of Delhi and others,

(2000) 9 SCC 745.

12.This Court has considered the submissions advanced by the learned advocates appearing for the parties, perused the impugned order as well as various orders passed by the Family Court as well as this Court during pendency of the proceedings and the judgements cited at the bar.

13.So far as the factual matrix is concerned, there is no dispute to the fact that the marriage of the petitioner and respondent was solemnized on 26.2.1993 and she was residing with him thereafter. Due to the wedlock, a female child named Aashaka was born on 9.5.1994. The relation between the petitioner and her husband-respondent became strained and therefore both are residing separately. The petitioner therefore filed an application under Section 9 of the Hindu Act before the learned Civil Judge (SD), Ahmedabad Rural against the respondent for getting decree of restitution of conjugal rights. In the said proceedings, the petitioner also moved an application under Section 24 of the Act claiming Maintenance, Pendente Lite and Expenses of Proceedings. The said application was registered at exh.4 in HMP No. 45 of 1998. The petitioner also filed application u/s 26 of the Act for custody of the minor child Aashaka. The said application was registered at exh.17 in HMP No. 45 of 1998. In the said proceedings, the learned Civil Judge passed the order and directed the respondent-father to bring the minor child Aashaka in the court. Thereafter Family Court was constituted and the case was transferred to the Family Court and it was newly numbered as Family Suit No. 333 of 2000.

14.The learned Family Judge heard the application exh.17 filed by the petitioner for taking custody of the minor child Aashaka. The learned Judge of the Family Court vide order dated 11.10.2001 partly allowed the application filed by the petitioner and directed the respondent to permit the petitioner to see her daughter Aashaka from 10.00 a.m. to 6.00 p.m. on every Sunday and also directed the respondent to see that the child Aashaka is sent to the place of the petitioner on every Sunday at 10.00 a.m.

15.Aggrieved thereby, the respondent filed Special Civil Application being Special Civil Application No. 11090 of 2001 before this Court, challenging the order passed by the Family Court. The said SCA 11090/2001 was finally heard by this Court (Coram: D.K.Trivedi,J). This Court vide order dated 21.3.2002 disposed of the said SCA. Aggrieved thereby the respondent filed Letters Patent Appeal being LPA No. 164 of 2002. The said LPA 164/2002 came up for admission hearing before the Bench comprising Hon'ble the Chief Justice and Mr. Justice B.C.Patel on 1.5.2002. The said LPA 164/2002 was withdrawn by the respondent.

16.In view of the aforesaid factual backdrop the core question that calls for determination of this Court is as to whether there is a power to review the earlier order passed by the Family Court and whether on the facts and in the circumstances of the case, the order of review is justifiable?

17.According to Mr. J.R.Nanavaty, learned advocate of the petitioner, once the order passed by the Family Court in an application below application exh.17 on 11.10.2001 has become final as the said order is merged

into the order passed in SCA 11090/2001 and LPA 164 of 2002 and when under the Family Court Act, there is no power to review and the review is not inherent power and it must be conferred by law or by necessary implication, the learned Judge of the Family Court was not justified in reviewing its earlier order. According to this Court the aforesaid submissions advanced by Mr. Nanavaty is devoid of any merits as it is ill-founded.

18. In the case of Patel Narshi Thakershi and others (supra), relied upon by Mr. Nanavaty, learned advocate of the petitioner, the Supreme Court has held that there is no provision in the Act from which the power of the State Government to review its own order under Section 63 can be gathered. It is obvious that the Commissioners functioning as delegates of its functions under Sec.63 of the Saurashtra Land Reforms Act (25 of 1951) cannot review its order. According to this Court, the aforesaid judgement is not applicable to the facts of the present case.

19. It is true that there is no specific provisions to review its earlier order under the Family Court Act. So far as the Family Court is concerned, there is prescribed procedure as to how the proceedings should be conducted before the Family Court. The jurisdiction of the Family Court is also prescribed. The application filed by the petitioner is under Section 9 of the Act seeking decree of Restitution of Conjugal Rights. In the said proceedings, the petitioner has filed application under Section 26 of the Act seeking custody of the minor child Aashaka during the pendency of the petition. Now, on having look at Section 26 of the Act, which in terms stipulate powers to the Court

to pass appropriate orders from time to time, including the interim order and also to make such provisions in the decree as may be deemed just and proper with respect to the custody, maintenance and education of minor children. Therefore it is difficult to accept the submissions advanced by Mr. J.R.Nanavaty, learned advocate of the petitioner that that there is no power of review with the Family Court. According to this Court, the power is inbuilt in Section 26 of the Act. Therefore, the said submission is devoid of any merits, liable to be rejected and accordingly it is rejected and it is held that the Family Court has power to review its earlier order with regard to the custody of the minor child Aashaka.

20. After having held that the Family Court has power to review its earlier order, the next question which is required to be answered is as to whether the learned Judge of the Family Court was justified in reviewing its earlier order?

21. According to this Court, there is ample evidence on record in this regard, which suggests that the learned Judge was justified in reviewing its earlier order as it was not enforceable in its true spirit. In this connection, it is required to be noted that during the pendency of the proceedings before the Family Court, the minor child Aashaka remained present before the Court on almost all dates to ascertain her willingness and wishes of the minor, but the minor child Aashaka did not show her inclination even to speak to her mother. Notwithstanding the above factual aspect, the Family Court passed the order below application exh.17 on 11.10.2001 which was challenged by the petitioner before this Court by filing SCA 11090/2001 which came

up for hearing before this Court (Coram: R.R.Tripathi,J). In the said proceeding also, this Court directed to bring the minor Aashaka to Court to ascertain whether she was willing to visit her mother. The respondent brought the minor child Aashaka to the Court. Minor Aashaka refused to visit her mother. This Court recorded the finding to the aforesaid effect. Thereafter the petition was placed before this Court (Coram: D.K.Trivedi,J) who confirmed the order of Family Court and directed to dispose of the main matter within a period of 2 months. In the said order, reference was made about the observations made by Mr. Justice R.R.Tripathi which reads as under:

> *"As found from the order by brother justice Ravi R. Tripathi, to find amicable solution arranged in the Chamber between the child, her mother and grand mother and looking to the attitude of the child towards her mother and strong feeling expressed by minor child Aashaka of non-cooperation towards her mother, has observed that no further arrangement is possible."*

22. Thereafter the respondent filed Application on 14.6.2000 for reconsidering the order dated 11.10.2001 to the effect that since the minor child Aashaka was not willing to see her mother even for a short time, it is not possible to grant any visiting right to the present petitioner. In the said proceedings also the learned Judge directed the respondent to bring the minor child Aashaka to the Court to ascertain as to whether Aashaka was willing to meet her mother or not. Minor Aashaka was brought to Family Court and was questioned in the Chamber of the learned Judge but minor child Aashaka did not show her willingness to meet her mother, therefore the Family Cort was constrained to pass the impugned order.

23.The matter does not rest here. In the present petition filed by the petitioner, this Court (Coram: Ms. R.M.Doshit,J) passed an order on 4.05.2004 allowing the petitioner to meet Aashaka twice a week and adjourn the same to 14.6.2000. The petitioner did come to the house of the respondent and minor child Aashaka refused to talk to the petitioner. Thereafter the matter came up for further hearing before this Court (Coram: K.S.Jhaveri,J) who also tried to know the sense of minor child Aashaka. At that time also she refused to talk to her mother. She was brought to the Court thrice during the said proceedings. During further hearing before this Court, minor Aashaka was brought to the Court as per order passed by this Court and a meeting was held for about 45 minutes between minor Aashaka and the petitioner in the presence of Ms. Archana Rawal, learned AGP. In the said proceedings also, the minor child Aashaka refused to talk to her mother and to accept any gift as well, which is reflected from the order passed by this Court on 1.07.2005.

24.In aforesaid view of the matter, according to this Court, minor Aashaka is not prepared and not willing to talk to her mother, that is the petitioner, therefore, according to this Court, there was no option for the learned Judge of the Family Court but to pass the order by which he has revoked his earlier order recorded below application exh.17 on 11.10.2001.

25.In the case of Bijay K. Prasad (supra), Supreme Court has observed in paragraph 3 as under:

> *"3. In course of hearing of this appeal, we have called upon the appellant to produce the child in chambers and pursuant to such directions, the said*

child was produced before us in chambers. Then we asked the child several questions. The mother was also called in the presence of the child and the child is categorical that she would like to stay with her father. It is to be stated that the child is staying with her father for the last eight years. In this view of the matter, we think it appropriate to direct that the girl child should be allowed to continue living with her father. The direction that th child should stay with her mother during the holidays is set aside. The divorce proceeding is restored back to the file and may be expeditiously tried and disposed of. It is open for either party to make application for custody of the child in accordance with law. Any further direction with regard to meeting the child can be obtained from the Family Court."

26.In the case of Sumedha Nagpal (supra), the Supreme Court has held that *the custody of the children u/s 26 of the Act as well as under Section 6(a) of the Hindu Minority and Guardianship Act, 1956 should be made bearing in mind the welfare of the child. It cannot be made simply on the basis of the rights of the parties under the law. Right of mother under S.6(a) proviso does not militate against concept of welfare of the child.*

27.Applying the principle laid down by the Supreme Court in above referred to 2 judgements to the facts of the present case, according to this Court, the learned trial Judge has considered the welfare of the minor child Aashaka and revoked the earlier order of visitation right granted in favour of the petitioner as it was not enforceable.

28.The learned Judge of the Family Court has observed all the aforesaid aspects of the matter in paragraphs 5, 6 an 7 of his order, which would be relevant to quote here:

*"**5**. On going through the record of this case, it*

appears that all the Hon'ble Judges through whose hands present case has passed have tried to see that the minor girl goes to her mother and mother gets some visiting hours of her daughter, but efforts of the Judges have went in vain because of the disinclination on the part of the minor child to do so. It is true that this court has passed the order and directed the respondent father to give custody of the child for a period of eight hours on every Sunday to the mother, but he is helpless in doing so because of the hostile attitude of the minor child towards her mother. In the case of Bijay K. Prasad v. Ranjana reported in (1999) 9 Supreme Court Cases 544 the Hon'ble Supreme Court had come across almost identical situation wherein minor girl had categorically wished to continue to stay with the father and the Family Court had also ordered that the girl child should remain with the father and spend some holidays with the mother as a result of this situation the Apex Court allowed father's appeal and set aside the direction that the child should stay with the respondent mother during holidays. In the case on hand similar is the situation. It is no doubt true that for minor girl, mother is the best company and also the guide. But when the child is not at all willing to go to her mother and is not willing even to see her and to talk to her even for a moment. It becomes impossible for the respondent father to comply with the order passed by the court. In such circumstances there is no alternative fr the court but to revoke the order passed earlier by it. More so when in Letters Patent Appeal No. 164 of 2002 while dismissing the said appeal the Hon'ble High Court has observed as under:

> *"After arguing the Appeal, at length and in detail, Mr. Harshad J. Shah, learned counsel appearing for the appellant, prays that the appeal may be dismissed as withdrawn in order to enable the appellant to approach the Family Court bringing to its notice the events subsequent to the order passed by it in the matter of visiting right of the respondent qua the child, and seek necessary modification in the order in that regard."*

6. *It, therefore, appears that the Hon'ble High Court has also believed that it is not possible for the respondent father to comply with the order of this Court, and therefore, he has been given an opportunity to move this court to bring its notice the events subsequent to the order passed by it in the matter of visiting right of the respondent qua*

the child and seek necessary modification in the order in that regard. In view of this order the respondent has filed this application.

7. *This Court had also thought it fit to call the child and to ascertain her wishes in this matter. She was brought before this Court and she was interrogated by this court in the Chamber in absence of both the parties to ascertain her wishes qua the visiting rights of the mother. At that time also the minor child's attitude was so strongly negative towards the suggestion of this court to see her mother and to talk to her that it was not thought it fit to compel her to see her mother. Under these circumstances, this court is satisfied on the point that it is not possible for the respondent father to comply with the order passed by this Court below application Exh.17 on date 11.10.2001. It is, therefore, of no use to keep the said order in force because it has become absolutely unimplementable."*

29. This Court finds itself in complete agreement with the findings recorded in aforementioned paragraphs 5, 6 and 7 by the learned Judge of the Family Court as, according to this Court, no other finding or conclusion was possible except the one reached by the learned Judge of the Family Court, which is required to be affirmed by this Court.

30. It may be noted that the petitioner has filed this petition, labelling it as a petition under Articles 226/227 of the Constitution of India, this Court treats it as a petition as the petition filed under Article 227 of the Constitution of India as it is filed against the interlocutory order passed by the learned Judge of the Family Court.

31. In the case of Sadhana Lodh v/s National Insurance Company Ltd., (2003) 3 SCC 524, a Three Judge Bench of the Supreme Court has held that the petition would not lie under Article 226 of the Constitution of India but the petition would lie under Article 227 of the

Constitution of India against the interlocutory order passed by the trial Court.

32.It is settled principle of law that powers vested in Court under Article 227 of the Constitution of India is a supervisory jurisdiction. The High Court must confine itself to the correcting of error of jurisdiction committed by the Courts below and it cannot assume suo motu jurisdiction of appellate Court and correct every mistake assumed to have been committed by the Courts below. It is a review of the decision making process and not the decision itself. The High Court cannot reappreciate preliminary or perceptive facts found by the fact finding authority under the statute. The aforesaid proposition of law is laid down by the Apex Court in the case of (i) Mohd. Yunus v. Mohd. Mustaqim & others, AIR 1984 SC 38, (ii) Khanna Improvement Trust v. Land Acquisition Tribunal and others (1995) 2 SCC 557 and (iii) H.B.Gandhi v. M/s Gopinath, (1992) Supp. 2 SCC 312 (iv) State of Maharashtra v. Miland and others, (2000) 1 SCC 4.

33.Seen in the above context, the petition lacks merit and deserves to be rejected.

34.For the foregoing reasons, the petition fails and accordingly it is rejected with no order as to costs. Rule is discharged.

(A.M.Kapadia,J)

Jayanti*